

July 5, 1998, Sunday *

* MAGAZINE DESK *

The War Between the States ... and Washington

By Garry Wills (NYT) 4135 words Some people play favorites with the Bill of Rights. The favorite amendment of gangsters is the fifth (no self-incrimination), of liberals the first (free speech), of drug dealers the fourth (no unauthorized search), of gun fondlers the second (to bear arms). Now, many people have a new favorite, the long-neglected 10th (powers not specifically assigned to Washington are reserved to the states). As recently as 1985, when the Supreme Court reversed one of its rare decisions based on the amendment (Garcia canceling Usery), the 10th was being called a dead letter. Certainly few people tried to 'take the 10th' the way gangsters and fellow travelers 'took the fifth.'

But now the amendment has many takers. The Supreme Court used it in 1992, 1995 and 1997 and shows an eagerness to extend that run. Bob Dole, in his last year in the Senate, began carrying the words of the amendment around with him for instant recitation. Newt Gingrich's insurgents relied on it in 1994 to preach devolution of power from the Federal to the state level. Even President Clinton gives states the title Louis Brandeis thought up for them, 'laboratories of democracy.' Gov. Tommy Thompson of Wisconsin thinks it is high time for the amendment to be resurrected. He claims he has been a voice for the 10th crying in the wilderness for many years.

The change is not just a matter of theory. States and localities are manifesting a new energy, almost a frenzy, in starting, altering or killing programs. In education alone, they have pioneered charter schools, vouchers for private schools, the canceling of affirmative action in colleges, the retrenchment of bilingualism, new rules for immigrant children, different approaches to truancy and various approaches to teaching religion in public schools or allowing religious groups to gather on public grounds.

In crime, states have reintroduced capital punishment and passed 'three strikes' laws. They have experimented with 'truth in sentencing' (no parole), mandatory sentencing, alternative sentencing and victims' compensation.

In politics, they have promoted term limits, tax caps, mandatory spending percentages, public campaign financing, the control of union dues and extensions of the ballot initiative.

On sexual morality, the states have enacted or reversed bills on gay rights, repealed sodomy laws, supported unmarried partners' benefits and proposed or opposed marriage between homosexuals.

On welfare, the states have tried different forms of job training and placement, compulsory work, public employment or compensated private employment and various forms of benefits for mothers on welfare (including child care and health insurance).

On the environment, they have regulated business, formed new protected areas and successfully defied Federal regulations (for example, on the disposal of nuclear waste in New York v. United States in 1992).

On health, they have considered regulations on assisted suicide, H.M.O.'s, late-term abortions and insurance affecting AIDS patients.

On guns, they have passed bills to protect concealed weapons or to impose local restrictions. They have defeated Federal restrictions on guns near schools (Lopez, 1995) and the attempt to use local sheriffs to implement the Brady Bill (Printz, 1997).

On a whole range of such issues, the states have been out ahead of Federal programs, reversing a long-term trend. In the Progressive era, regulation of corporations was sought at the national level. In the Bull Moose movement, and during Woodrow Wilson's first term, intellectuals aspired to policy roles in Washington. With the New Deal, their drift toward the center became a stampede. From that point on, an overlapping series of crises (Depression, world war, cold war) led to central mobilization and control of resources. But now, with the end of this half-century of crisis, people with new ideas and a passion for public policy are turning away from Washington and attacking social issues at the state and local levels. This shift raises deep questions about the virtues of direct democracy, the merits of federalism and the possibility of isolating states from the national society.

California, as usual, has blundered furthest outward. Ronald Reagan went forth from California to shrink the Federal Government and essentially failed. Howard Jarvis stayed home in California and succeeded. His Proposition 13 capped property taxes and thereby (his critics allege) wrecked the state's public education system. The state's punitive measures against immigrants and their children have been checked by the courts, have backfired against their sponsors (including Gov. Pete Wilson) and have unsettled candidates dependent on Hispanic or Asian voters. Draconian term limits (six years for Assembly members) were supposed to curtail careerism, the power of special interests, cronyism and the lobbyists' sway -- but have increased all four.

Peter Schrag, in his sobering new book, ''Paradise Lost,'' describes what occurred at the first great turnovers of office, six years after term limits passed in 1990: ''By general agreement, the 1995-'96 term-limits-crunch session of the California Legislature was probably the most mean-spirited and unproductive in memory, a unique combination of instability, bad behavior, political frenzy and legislative paralysis. In the two years between 1995 and 1997, California had five Assembly Speakers, two different Republican Assembly leaders, two Republican Senate leaders and eight special legislative elections, not counting runoffs, among them three recalls.''

It is probably unfair to judge any movement by its effect in California. Some local programs have shown initial promise -- school vouchers in Ohio, charter schools in Arizona, inventive policing in New York, job training in Michigan, public campaign financing in Maine. Much of the activity has been stimulated or guided by a new generation of Republican governors, whose careers depend on making the programs

work. The emphasis on localism is partly a byproduct of the fact that three-quarters of the American people now live under Republican governors.

The foremost champion of local control among the governors is Tommy Thompson, a short, chunky man from Elroy, Wis. (population 1,500), who has a Cagney strut and very modest amounts of modesty. "We started it," he says. "I was the front-runner because I started looking at the Federal laws and figuring how I'd go to Washington and get waivers." Such waivers are special dispensations from Federal regulations. "I'm the only governor who still has waivers in existence, in the area of welfare, from Presidents Reagan, Bush and Clinton. I think I've got 75 outstanding waivers, which changed Federal law in over 200 instances in the area of welfare."

Welfare is not the only policy on which Thompson has been an innovator. In education, he fought truancy with "Learnfare" and set up choice schools, charter schools, "prep tech" and apprenticing and high-school courses for college credit. He talks of a "broad menu" of options for students. He clearly does not think that local government has to mean minimal government.

In fact, his administration (begun in 1986) has been a kind of mini-New Deal for proliferating programs, acronyms and slogans -- P.F.R. (Parental and Family Responsibility), S.S.F. (Self-Sufficiency First), W.E.J.T. (Work Experience and Job Training Program), Work First, Work Not Welfare, Children First. Many of these have been folded into his master plan, implemented this year as W2 (shorthand for W.W., or Wisconsin Works). His critics say that some of those plans have come and gone so fast they are impossible to evaluate. But he says they should be judged as steps toward his overall plan, whose parts are still being assembled.

He has a health plan for the poor (Badger Care) that awaits more waivers. ("President Clinton is setting on it now.") His job-training program is similarly stymied by Washington: "There are 163 different kinds of rules and regulations dealing with school-to-work and job-ready money from the Federal Government. It's just plain idiotic."

Thompson has moved further and faster than other governors in taking control of his state's activities on many levels, but he says he cannot be judged until his whole plan is in operation and that will not happen until Washington unties his hands. Naturally, since he thinks he is just beginning to get his schemes in place after 12 years in the Governor's Mansion, he is adamantly opposed to term limits: "If you have people dumb enough to keep running for office, like me, you should let the people decide."

Thompson's central planning can look good if you consider the California alternative. There, the governor's hands are tied, not so much by Washington as by popular initiatives that have made a traffic jam of election ballots. In 1990, the state's ballot pamphlet setting forth the voters' choices ran to 222 pages. At a city election in San Francisco, there were more than 100 items. Voters, apparently, did not notice that in 1988 they passed one measure for public financing of

campaigns (Proposition 68) and, simultaneously, another measure (Proposition 73) outlawing it.

Nor is California alone in this sharpening appetite for plebiscites. In 1996, 90 ballot initiatives were up for passage in 20 states. The referendum, too, is becoming more important, as Maine's overthrow of a gay-rights law demonstrated.

The contrast between California's free-for-all and Wisconsin's central planning shows that the cry for localism is not for a single good thing (state government) against an equally monolithic bad thing (the Federal Government). Local government can be improvisational or controlled, experimental or rigid, or anything in between.

Governor Thompson is certainly not a champion of localism if that means cities or counties or the State Legislature can defy his general strategy. He boasts of the 290 items he vetoed in the first budget submitted by the Legislature. He has used the line-item veto more than 1,500 times.

Advocates of direct democracy, like Robert Wiebe, the political historian and theorist, oppose "government by experts," and Thompson sometimes makes fun of Washington "know-it-alls" who could not pass his "Elroy test" (what his little hometown knows is good for it). But Thompson also boasts of his reliance on experts, called in from all quarters to help him with planning. One of those experts, Lawrence Mead, wants to make welfare "the new paternalism," frankly telling people what is good for them. Temperamentally, Thompson is inclined to such hectoring certitude, despite his populist campaign rhetoric.

I recently followed Thompson, who was out to greet some constituents at the state environmental center. With men, he has some of Mario Cuomo's locker-room bluster. ("Don't be a wimp.") With women, he is a palsy chin-chucker. Despite the fact that both his parents were teachers and his wife still is (sixth grade in Elroy), he uses what must pass as "street talk" in rural Wisconsin -- "setting" for sitting, "oncommon" for uncommon, "secatary" for secretary.

He presents himself as embattled and with few allies: "I'm the only one still talking devolution." The Republican Congress is "as bad as the President." He feels that he has the spirit of Fighting Bob La Follette, the Wisconsin progressive -- except that La Follette went after big business and Thompson is a sworn foe of big government (at least in Washington). If one of Thompson's projects fails, he wants us to believe, it will be because of his encirclement by foes.

To get a "top down" view of the states' new activism, I interviewed President Clinton in April. He had just come in from a Rose Garden announcement of his education program. Clinton, the policy wonk, was eager to talk governmental relations even when aides were trying to move him to the next event. He finds the states'-rights activism a healthy development.

"What the states did in assuming greater responsibilities was mostly positive -- in education, in taking advantage of the opportunity Congress gave them to be more active in covering more children under

child health programs. What my Administration tried to do was, basically, to emphasize two things -- No. 1, states as laboratories of democracy, principally in education, health care and welfare reform; and secondly, actually reduce the aggregate volume of regulations on them in areas where I thought there was too much micromanagement.'

Thompson would clearly not see this waiving of authority as sufficient. He would like even less Clinton's caveat that, in giving up some power to the states, the Federal Government was freed to do new things. 'We have been more active in some areas than the Federal Government traditionally has been -- in education, in wiring of schools and in trying to actually help them hire teachers to lower class size, the way we broke new ground by helping local law enforcement hire new officers.' In short, Clinton does not see the states shoving the Federal Government off the scene but interacting with it in new ways.

Clinton is critical of the Supreme Court's tendency to exclude Washington from state-level activity, going beyond what Clinton praises as 'basically a pragmatic reallocation of power between the states and the Federal Government over the last 20 years.' He is especially upset by the Supreme Court's Brady Bill decision, 'the most troubling of all because it said we couldn't even ask the local law-enforcement officials to do a minor ministerial job' of running background checks on gun purchasers.

On the other hand, Clinton takes a surprisingly benign view of state initiatives that express popular feeling rather than court-imposed mandates: 'I don't agree with a lot of those votes, but I think they're votes that people have the right to make as long as they don't contravene a Federal statute or the Constitution.

'Usually there is a legitimate concern that these referenda are designed to address. Either representative government is going to have to move quickly into the breach when one of these proposals is on the ballot, so that it is not necessary by election time, or the progressive populists are going to have to put their own counter-proposals on the ballot. I don't think you can stop this movement any time soon when people want to have a more direct say on public issues.'

We can see, by counterpointing the remarks of the Governor and the President, that there is little prospect of agreement in detail on the future of states' rights. The President is well disposed toward ballot initiatives, the most direct form of democracy. Governor Thompson is uneasy about uncoordinated proposals that might intrude on his master strategy. Though he once proposed introducing the initiative into the Wisconsin Constitution, that was when he was a young legislator. Now, he says, he is not interested in raising that issue.

Yet as a 10th Amendment fundamentalist, Thompson welcomes the Court's new interest in states' rights -- while the President resists any effort to break up the partnership. The place where this disagreement causes a head-on collision is the devolution of power over things like welfare. Thompson thinks Washington has been too slow and niggardly in turning over money. Clinton's liberal critics, by contrast, think he was too quick to untie strings over welfare programs. The President

himself considered the Republican bill he signed too sweeping on some matters, but feels he remedied that by restoring food stamps and child-care provisions.

I asked him if he thinks that state welfare programs, spotty in their success even during a prosperous time, will stand up when economic reverses come. "Absolutely, as long as we keep the fundamental protection for children. We had, in my view, state-by-state settling of reimbursement for welfare families anyway.

"Before I signed the welfare bill, the reimbursement schedule for a family of three on welfare went from a low of \$185 in Mississippi and Texas to a high of \$660 in Vermont, and most states had welfare payments that were lower in real dollar terms, considerably lower, than they had been in the early 70's, because they had not kept up with inflation. So the Congress, long before I came along, had de facto ceded the monthly payments to the states anyway. Now the states are responsible.

"In the old days, nobody had to take responsibility for the welfare of the family and of the children, or whether there was a work-based program. Everybody could always kick the responsibility around. They could say that 'in our state the Federal Government has all these rules -- and, oh, by the way, it's operated by the county.' I think that locating responsibility and fixing it with the states will be more positive than negative."

It is here that Thompson gets heated in his comments on the President. "President Clinton has done everything he possibly can to stymie what we're trying to do in Wisconsin." He has words just as harsh for Donna Shalala of Health and Human Services. "I could get matching grants" for new programs, Thompson complains, but the Government will not turn over the money he feels he needs. On this point Thompson will get no help from the Federal courts. They have repeatedly ruled that states have to observe Federal conditions if they accept Federal money.

Thompson desperately needs Federal money. As he readily admits, Workfare, at least at the outset and for some time to come, is more costly than welfare. To train people for work, to deal with obstacles to work (alcohol, drugs, mental problems), to find jobs, to motivate employers, to offer child care for those going to work, to provide health insurance -- all this is not only expensive in itself but also has to be closely monitored. That is why the per-person yearly cost for people on welfare has gone up under Thompson, from \$9,000 to \$15,000.

Thompson's programs bring back the resented "social worker," who was an irritant under the old paternalism. His Learnfare program, for instance, was meant to dock welfare payments to any family whose child was not attending school. This involved keeping accurate truancy records, comparing them with welfare payments and weighing any alleviating circumstances (illness, transportation problems, children no longer living with their families, etc.). According to Pamela Fendt, a policy analyst at the University of Wisconsin at Milwaukee's Center for Economic Development, Learnfare saved \$3 million in welfare payments but cost \$14 million.

The expenses of Workfare exert tremendous pressure on the system to remove people from the program, one way or another. That is why Governor Thompson has tried to reach job-placement goals faster than required by Federal rules. One way to remove people from the rolls is simply to declare them ineligible. In Wisconsin, as in other states, many of those declared ineligible were reinstated on appeal. In Wisconsin, as in other states, the numbers going off welfare are not matched with reported jobs and income. Marcus White, associate director for the Interfaith Conference of Greater Milwaukee, says that there has been a quantum leap in the people showing up at Milwaukee shelters and soup kitchens, suggesting that not everyone disappearing from the welfare rolls is getting work.

So far, with the help of a booming economy in Wisconsin, the Governor has kept scrambling ahead of any clear signs of failure. When I suggest that Federal oversight might be justified by less commendable showings in other states, he is dismissive. "They're always saying that, that the states were going to be having a race to the bottom. I told them: 'You're wrong. That may have happened in the 40's and 50's. But right now you've got governors who are so darn competitive. They don't want to read that they're not taking care of the poor, and they're not going to let a governor in an adjoining state get ahead of them. We're very competitive.'"

But Gov. Phil Batt of Idaho is not, apparently, feeling any competitive pressures. His state has cut welfare rolls by 77 percent, belying President Clinton's claim that disparities will be less acute under the new system. Idaho, which has the highest incidence of child abuse in the nation, spends \$17 per capita for child welfare, as opposed to \$99.30 in New York.

Peter Edelman, who resigned from the Department of Health and Human Services to protest Clinton's signing of the 1996 welfare bill, has kept a close eye on subsequent developments in the states. "There are some bright spots," he says. "There are some good states -- Maine, Vermont, Rhode Island, Minnesota, Oregon. But there are some very bad states -- Idaho, Mississippi, Georgia -- and some states, like Pennsylvania, are not doing much. In California, the Governor proposed a bad plan that the Legislature blocked."

Governor Thompson claims that the states are sure to do things better than the Federal Government, since they are closer to the peoples' needs and wants. "The new ideas are coming from the governors, and when you have that clash of ideas, you're going to bring out the best in education or in government."

When I suggest that not all the ideas coming from the states are great ones, he is quick, as ever, to the challenge: "Tell me some that aren't." I name term limits, three-strikes, anti-immigration measures, anti-gay measures. "You're right," he says. "I'll grant you there are some examples. But tell me some things in Wisconsin you don't like."

Thompson believes that the government closest to the people is the best government, which many people take to be a truism of democracy. Alexis de Tocqueville, during his 1831 visit to America, noted that "the

Federal Government scarcely ever interferes in any but foreign affairs; and the governments of the states in reality direct society in America.'" The result, according to Tocqueville, was a "'tyranny of the majority,'" by which local prejudice and conformity received no outside challenge.

It is the same complaint Madison had against the states' autonomy under the Articles of Confederation. The people were, in effect, the judges in their own cause -- which always leads to skewed judgments. John Jay, arguing in "'The Federalist'" for a larger union, said that the people least likely to make wise policy about Native Americans were those in the friction of greatest proximity to them. It is the same lesson we learned, in this century, from the assertions of Southern leaders that they best understood blacks.

Though popular sentiment must be expressed in popular government, it is clear that some kinds of dispute need impartial arbiters. The effort of some states to deny education to the children of illegal immigrants, or legal rights to homosexuals, or organization to unions, shows that popular sentiment can be harsh with unpopular people.

Actually, there is no danger of returning to the Jacksonian days of independent states. Even if you remove the Federal Government from the scene, other national organizations cut across state lines and have to be addressed in a national way.

When I asked Governor Thompson why he did not start his new educational programs in the public schools, he said the teachers' union was too powerful. "'If I wanted to hire you from Northwestern to teach in the public schools, I could not give you a contract. The union has to decide what you can teach and where. You might end up teaching music in an out-of-the-way school.'" Even allowing for hyperbole, teachers' unions are national organizations that can be hard to deal with on the state level.

The best proof of the states' vulnerability to national forces is the flow of outside money and influence into the local arena. When Maine put up its referendum to remove a gay rights law, religious organizations sent in money for ads and teams of "'ex-gays'" traveled there to support the measure. At an advanced level of communications and transportation, and with the complex organization of religious, ideological and educational enterprises, a return to the independent states of Jackson's time is impossible. To deal with national organizations, whether corporations or unions, philanthropies or crime syndicates, the states are often going to need help from the national Government.

President Clinton ended our interview by noticing how the hard line between domestic and foreign policy is being dissolved. There is a parallel softening of the division between state and national life, not just in government but in every sphere. This does not mean that states are not better at handling some things or at conducting experiments not easily tried on a national scale. There will be, as Clinton says, new kinds of interaction, dialogue and dispute. All that is healthy. But a 10th Amendment fundamentalism that looks back to the muscular states of

the Jacksonian era is, by now, an exercise in nostalgia for ''good old days'' that were not all that good.